

HOUSE BILL REPORT

SHB 1088

As Amended by the Senate

Title: An act relating to potential impeachment disclosures.

Brief Description: Concerning potential impeachment disclosures.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Lovick, Goodman, Fitzgibbon, Johnson, J., Slatter, Wylie, Ramos, Bateman, Berry, Dolan, Tharinger, Simmons, Ryu, Ramel, Shewmake, Leavitt, Senn, Peterson, Gregerson, Valdez, Callan, Chopp, Duerr, Ormsby, Taylor, Lekanoff, Santos, Macri, Frame, Orwall, Berg, Pollet and Harris-Talley).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/20/21, 1/29/21 [DPS].

Floor Activity:

Passed House: 2/10/21, 61-37.

Senate Amended.

Passed Senate: 3/9/21, 46-3.

Brief Summary of Substitute Bill

- Requires the Washington Association of Prosecuting Attorneys to update its policy addressing potential impeachment disclosures and develop online training consistent with the policy.
- Requires law enforcement agencies to report to prosecuting authorities an officer's misconduct affecting credibility or any act of an officer that may be potentially exculpatory to a defendant.
- Requires law enforcement agencies, prior to hiring an officer with previous law enforcement experience, to inquire whether the officer has ever been subject to potential impeachment disclosure.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Hansen, Chair; Simmons, Vice Chair; Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez and Walen.

Minority Report: Without recommendation. Signed by 6 members: Representatives Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Klippert and Ybarra.

Staff: Edie Adams (786-7180).

Background:

Prosecutors have an affirmative duty to disclose exculpatory evidence to the defense. This duty arises from constitutional due process requirements, as well as court rules and rules of professional conduct for prosecuting attorneys.

Under the United States Supreme Court case *Brady v. Maryland (Brady)* and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. The duty to disclose applies even if the defense has not requested the information. This obligation extends not only to potentially exculpatory evidence, but also to evidence impeaching the credibility of a government witness. Potential impeachment evidence includes information that a reasonable person could view as impairing the witness' credibility or competence. With respect to police officers who are government witnesses, impeachment evidence can include a prior conviction related to dishonesty, misconduct involving dishonesty or abuse of authority, and evidence tending to show a bias or some motive to lie.

Court rules and professional conduct rules also address the duty of prosecutors to disclose exculpatory evidence. Under Criminal Rule 4.7, a prosecutor must disclose to the defense any material or information within the prosecutor's knowledge that tends to negate the defendant's guilt as to the offense charged. The rule also specifically requires disclosure of prior criminal convictions of any government witness. Rule of Professional Conduct 3.8 establishes special responsibilities of prosecutors, and provides an obligation for a prosecutor to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

Washington Association of Prosecuting Attorneys Model Policy.

In 2013 the Washington Association of Prosecuting Attorneys developed a model policy on potential impeachment disclosures. The model policy provides guidance to prosecuting attorneys on the scope of the duty of disclosure. Under the model policy, the prosecuting attorney has the obligation to make determinations regarding whether information is potentially exculpatory and subject to disclosure. The duty to disclose extends to any

information that tends to negate the defendant's guilt, including any prior convictions as well as information that a reasonable person, knowing all the relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a criminal proceeding. The model policy also addresses procedures to be followed when making potential impeachment disclosure determinations and maintenance of any list of potential impeachment disclosures.

Washington Association of Sheriffs and Police Chiefs Model Policy.

The Washington Association of Sheriffs and Police Chiefs (WASPC) also has adopted a model policy that addresses potential impeachment disclosure information that may be in the possession of law enforcement agencies. Under WASPC's model policy, law enforcement agencies must investigate all complaints against their officers. An agency must review all internal investigation files to determine if there is potential impeachment information on any officers who may be called as witnesses. The agency must disclose any potential impeachment information discovered to the prosecutor, and must notify the prosecuting attorney any time the agency becomes aware of new potential impeachment information.

Summary of Substitute Bill:

Washington Association of Prosecuting Attorneys Model Policy.

The Washington Association of Prosecuting Attorneys (WAPA) must update its best practices policy addressing potential impeachment disclosures pursuant to *Brady* and subsequent cases within six months of the effective date of the act. The WAPA must consult with the following entities in updating the policy: Washington State Association of Municipal Attorneys, Washington Association of Sheriffs and Police Chiefs, Washington Council of Police and Sheriffs, Fraternal Order of Police, and Washington State Patrol Troopers Association.

The policy must provide guidance for: (i) the types of conduct that should be recognized as potentially exculpatory or as creating potential impeachment material; (ii) how information about an officer or officer conduct should be shared and maintained; and (iii) under what circumstances an officer's information or name may be removed from any list of potential impeachment disclosures.

The WAPA must develop and maintain online training for potential impeachment disclosures consistent with its policy, subject to amounts appropriated for this purpose. The online training must be developed no later than June 30, 2022.

Law Enforcement Responsibilities.

A law enforcement agency must report to prosecuting authorities the discovery of an act of an officer that may be potentially exculpatory to a criminal defendant, or that an officer has engaged in misconduct affecting his or her credibility. The report must be made to the prosecuting authority of any jurisdiction in which the officer may testify as a witness within

10 days of the agency's discovery of the act or misconduct.

Prior to hiring an officer with previous law enforcement experience, an agency must inquire as to whether the officer has ever been subject to potential impeachment disclosure, and must verify the response with the prosecuting authorities in the jurisdictions of the officer's previous employment. The fact that an officer has been subject to impeachment disclosure is not, in and of itself, a bar to employment. Any prehiring process or hiring decision by an agency does not constitute a "personnel action" action under a statute that prohibits an agency from taking an adverse personnel action against an officer solely because the officer's name is on a potential impeachment disclosure list. Within 10 days of hiring an officer with a prior potential impeachment disclosure, the agency must forward that information to the prosecuting authority of any jurisdiction where the officer may testify as a witness.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment removes the requirement that the Washington Association of Prosecuting Attorneys (WAPA) update its model policy on potential impeachment disclosures and instead requires each county prosecutor to develop and adopt a written protocol on potential impeachment disclosures. The prosecutor must develop the protocol with consultation of agencies representing law enforcement officers and departments that will be impacted by the protocol. The protocols must be in place no later than July 1, 2022, and reviewed every two years to determine whether modifications are needed. The Criminal Justice Training Commission (rather than the WAPA) must provide online training on potential impeachment disclosures, or contract with an organization that serves prosecuting attorneys in Washington to provide such training.

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The Senate amendment requires prosecuting authorities to respond within 10 days of receiving a request from a law enforcement agency for verification of an officer's response regarding whether the officer has ever been subject to potential impeachment disclosure. An appointed or elected public official, public employee, or public agency is immune from civil liability for sharing impeachment information about an officer with the officer's employer, potential employer, or prosecuting authority unless the official, employee, or agency acted with gross negligence or bad faith.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Truth matters in the justice system; courts cannot function properly without it. The bill is about whether you can rely on an officer for the truth. The bill creates best standards and online training opportunities, and requires law enforcement agencies to inquire about this issue before hiring.

The bill requires an update of statewide standards for best practices regarding potential impeachment disclosures. This is good policy and prosecutors are committed to working with law enforcement so that potential impeachment information is provided to prosecutors and stays up to date. Agencies should be allowed to refrain from hiring officers who are on a *Brady* list because officers who have misconduct indicating a lack of credibility are limited in their ability to completely fulfill their job obligations.

Unproven allegations can have significant adverse impacts for an officer being able to perform their duties as well as their reputation. When an allegation is determined to be unfounded, the officer's name should be removed from a *Brady* list, and the bill requires the model policy to address that. It also reiterates the policy that an employer should not be able to take an employment action solely on the basis of potential impeachment disclosure information.

Half of known cases of wrongful conviction nationally, and well over half of such cases in Washington, involved withheld evidence that should have been disclosed. Few, if any, of these cases were overturned on this basis. Either this is being done knowingly, or there is not a comprehensive understanding of what needs to be disclosed. The defense bar should be included in the discussions regarding standards for disclosure.

(Opposed) Language in the bill inaccurately reflects court rulings about timelines and when disclosures must be provided and this should be corrected. The provision requiring agencies to inquire about an officer's prior impeachment disclosures before hiring sets agencies up to violate another statute that prohibits adverse personnel actions based on the fact an officer's name is on a potential impeachment list. This could be addressed by requiring the agency to gather the information after hiring an officer, or by clarifying that a hiring decision is not a personnel action under the other statute.

(Other) The defense bar has concerns with one part of the bill that says the best practices policy will include when an officer's information may be removed. Court decisions do not mention removing an officer's name from a *Brady* list and doing so flies in the face of requirements under the case law. It is important that officers be held to a high standard. Prior misconduct does not go away over time. Disclosure is always required and a name should never be removed from a *Brady* list.

The bill does not go far enough. A better approach would be to create a working group to report back so that the Legislature could put these standards in statute. There is a lack of uniformity on how potential impeachment disclosure is handled in the 39 counties. Putting the standards in statute would better serve the interests of law enforcement.

Persons Testifying: (In support) Representative Lovick, prime sponsor; Jeff DeVere, Washington Council of Police and Sheriffs; Russell Brown, Washington Association of Prosecuting Attorneys; Lara Zarowsky, Washington Innocence Project; and Lisa Herbold, City of Seattle.

(Opposed) James McMahan, Washington Association Sheriffs and Police Chiefs.

(Other) Emily Gause, Washington Defenders Association, and the Washington Association of Criminal Defense Attorneys; and James Schrimpsheer, Washington State Fraternal Order of Police.

Persons Signed In To Testify But Not Testifying: None.